

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)
)
Plaintiff,)
)
v.)
)
TYSON FOODS, INC., et al.,)
)
Defendants.)

Case No. 05-cv-329-GKF(SAJ)

**STATE OF OKLAHOMA'S MOTION FOR SANCTIONS AGAINST THE CARGILL
DEFENDANTS AND INTEGRATED BRIEF IN SUPPORT THEREOF**

Expedited Consideration Requested

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), and, pursuant to Fed. R. Civ. P. 37, respectfully moves this Court for an order imposing sanctions against the Cargill Defendants for failing to make its 30(b)(6) designees available for deposition. In support of this motion, the State states the following:

1. On July 13, 2007, the State served 30(b)(6) deposition notices on the Cargill Defendants. *See* Exs. 1 & 2 to DKT #1244.
2. The Cargill Defendants objected and refused to produce properly prepared 30(b)(6) designees.
3. Accordingly, on August 16, 2007, the State brought a motion to compel. *See* DKT #1244.
4. After briefing and oral argument on the issue, on October 24, 2007, the Court set the parameters for required preparation of 30(b)(6) designees. *See* DKT #1336.

5. On December 21, 2007, the State renoticed the 30(b)(6) depositions of the Cargill Defendants for January 30 and 31, 2008. *See* Exs. 1 & 2.

6. In an effort to accommodate a request from the Cargill Defendants, the State proposed narrowing the 30(b)(6) notices so that those topics most pertinent to issues pertaining to the State's Preliminary Injunction Motion would be covered at depositions on January 30, 2008, and the remaining topics would be covered at deposition following the preliminary injunction hearing. *See* Ex. 3.

7. Rather than respond to this good faith effort by the State to accommodate the Cargill Defendants, the Cargill Defendants, in a wholly improper move, attempted to seek relief from these depositions in their report to the Court on the status of Defendants' 30(b)(6) depositions of the State. *See* DKT #1453 ("Supplemental Status Report Regarding Cargill Defendants' Motion to Compel Plaintiffs [sic] to Designate Deponents Under Rule 30(b)(6) and State of Oklahoma's Motion for Protective Order Regarding the Conduct of 30(b)(6) Depositions of the State") & DKT #1457 ("State of Oklahoma's Motion to Strike Paragraph 9 of the 'Supplemental Status Report Regarding Cargill Defendants' Motion to Compel Plaintiffs [sic] to Designate Deponents Under Rule 30(b)(6) and State of Oklahoma's Motion for Protective Order Regarding the Conduct of 30(b)(6) Depositions of the State").

8. On January 16, 2008, this Court entered an order stating:

Based upon the status reports [Dkts. 1452 & 1453] filed on 1/11/08, Plaintiff's Motion for Protective Order [Dkt. 1309] and Cargill Defendants' Motion to Compel [Dkt. 1270] are stricken, to be refiled should meet and confers fail to resolve the issues, following hearing on preliminary injunction. Plaintiff's Motion to Strike [Dkt. 1457] is denied as moot.

DKT #1462.

9. In a misrepresentation of the Court's order, the Cargill Defendants, in a January 16, 2008 letter to the State, asserted: "Finally, having reviewed Judge Joyner's Minute Order of this afternoon, it seems clear all 30(b)(6) witness issues are deferred until after the Preliminary Injunction hearing." *See* Ex. 4 (emphasis added).

10. A review of the docket numbers cited in the January 16, 2008 Order makes abundantly clear that the postponement in 30(b)(6) depositions pertains to the State's 30(b)(6) designees. The suggestion that this Order applies to postpone wholly unrelated depositions of the Cargill Defendants' 30(b)(6) designees, thereby cutting off the State's right to develop evidence necessary for the preliminary injunction hearing, is simply wrong.¹

11. Accordingly, still in the spirit of compromise, on January 18, 2008, the State served pared-back 30(b)(6) deposition notices for January 30, 2008, that focused on issues pertaining to the State's Motion for Preliminary Injunction. *See* Exs. 5 & 6.

12. In response, the Cargill Defendants continued to attempt to evade the depositions. *See* Ex. 7 (Jan. 18, 2007 e-mail stating, "Richard: Let's get together and plan a date certain for March after spring break. JT").

13. On January 19, 2008, the State responded: "John I would like very much to do so however we have been trying to get a substantive 30b6 deposition of Cargill for months. We simply need this 'lite' portion of our 30b6 deposition in advance of the PI. I've cut in half what was originally planned and that is the best I can do at this time. Rick." *See* Ex. 8.

14. By letter dated January 23, 2008, the Cargill Defendants reiterated their misrepresentation of the scope of this Court's January 16, 2008 Order, and their position that they

¹ That portion of the Order denying as moot the State's Motion to Strike [DKT #1457] is simply a recognition by the Court that there was no properly pending issue before it regarding any relief from the State's 30(b)(6) notices of the Cargill Defendants.

would not be presenting their 30(b)(6) designees until after the preliminary injunction hearing.

See Ex. 9.

15. In a January 25, 2008 telephonic meet and confer on the matter, the Cargill Defendants persisted in their position that they would not be producing a properly prepared 30(b)(6) designee in response to the State's properly noticed 30(b)(6) deposition notices.

16. In short, the Cargill Defendants have refused to present their 30(b)(6) designees for deposition on January 30, 2008, despite the fact that: (a) the Cargill Defendants have been compelled to produce properly prepared 30(b)(6) designees, (b) the deposition notices have been pared-back in scope to accommodate a request from the Cargill Defendants, (c) this Court's January 16, 2008 Order did not address the State's 30(b)(6) depositions of the Cargill Defendants, and (d) the State needs this information to prepare for the preliminary injunction hearing.

17. Fed. R. Civ. P. 37(d)(1)(A)(i) provides:

The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4) -- fails, after being served with proper notice, to appear for that person's deposition[.]

18. The foregoing chronology makes clear that the State has conferred in good faith with the Cargill Defendants in an effort to resolve this matter without court action.

19. Fed. R. Civ. P. 37(d)(1)(3) provides:

Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

20. Fed. R. Civ. P. 37(b)(2)(A)(i)-(vi) provides:

If a party or a party's officer, director, or managing agent -- or a witness designated under Rule 30(b)(6) or 31(a)(4) -- fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

21. Given the importance of these long-sought-after depositions to the preliminary injunction proceeding, the State submits that the appropriate remedy is for this Court to strike any response of the Cargill Defendants to the State's Motion for Preliminary Injunction and grant the relief requested in the State's Motion for Preliminary Injunction against the Cargill Defendants by default. *See* Fed. R. Civ. P. 37(b)(2)(A)(ii) & (vi).

22. Further, the Cargill Defendants should be required to produce their 30(b)(6) designees on January 30, 2008 for deposition.

WHEREFORE, premises considered, the State's Motion for Sanctions should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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